No. 9474

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

12

SOUTHERN PACIFIC COMPANY,
(a corporation),
Appellant,

vs.

JOE CONWAY,
Appellee.

APPELLANT'S REPLY BRIEF.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Luhrs Tower, Phoenix, Arizona,
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
65 Market Street, San Francisco, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Text

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(The parties are designated as in the trial Court, and the other briefs in this court; i.e., Appellant as Plaintiff; Appellee as Defendant.)

Appellee's (Defendant's) brief contains but little not already presented at earlier stages of the case, and therefore largely anticipated in our opening brief. Consequently, this reply will be devoted principally to pointing out what appear to us to be errors and omissions in his discussion, with reference to those portions of our opening brief where his major contentions are reviewed at greater length.

Defendant's brief, pp. 1-2.

The complaint herein does not, as defendant asserts, seek merely a declaration "that the Train Limit Law

is unconstitutional". It also asks that the statute be declared "unenforceable" (prayer of complaint; R. 44). This purpose is likewise particularly stated in paragraphs II-c (R. 4), and XIV (R. 36) of the complaint. It is also made clear therein (pars. II-e, XV; R. 5, 39-40) that the suit relates to the rights, *powers* and *duties* of the parties. Such powers and duties, so far as concerns defendant, have to do solely with the enforcement of the Law.

We stress this point at the outset because defendant makes similar statements, at various other places in his brief (e. g., pp. 10-11, 25), and indeed predicates much of his argument thereon. Defendant has simply overlooked the plain language and clear intendments of the complaint.

Defendant's brief, pp. 5-8.

The record of the pre-trial conference (R. 75-76) shows that defendant *admitted* that the Constitution and Laws of Arizona confer upon him exclusive power and duty to enforce the Train Limit Law (as alleged in par. I-b of the complaint), "but in the case of a constitutional law." He now says that because he elsewhere admitted that the law is void, he has in effect *denied* paragraph I-b, and was therefore properly shown as having done so in the "corrected" pre-trial order. Defendant thus treats his confession of unconstitutionality (openly repudiated less than six months later) as a *final* determination, which prevents him from exercising or claiming any power or duty under the Law; and pointedly ignores both his own

statement (R. 140) that the law's validity is for the courts, not for him, to determine, and the authorities (our opening brief, pp. 26-29) which establish that the courts alone have such power, and that his own official opinion, however solemnly announced, is merely advisory.

Defendant's admission, far from being viewed as a denial, should be regarded as if he had said:

> "I admit that the Law, if valid, imposes the duty of prosecution on me; and while you (plaintiff) say that the Law is void, and I am inclined to agree, neither your opinion nor mine is effective. The courts alone can effectively determine that the Law is void."

As anticipated (our brief, p. 37), defendant seeks to sustain the trial court's action in amending the original pre-trial order so as to show that defendant had *denied* (instead of admitted) an essential part of paragraph XVI of the complaint (when in fact "the whole of 16" was admitted, R. 90), by claiming that the admission was inadvertent and unintentional. This claim is clearly without substance. If defendant's counsel were really inadvertent, they should have realized that fact within a reasonable time after pre-trial conference, and thereupon made appropriate motion to reopen the conference or correct the *record*. They made no such motion; they do not even now assert that the stenographic record of the conference is not correct, as printed in the transcript. Examination of that transcript shows that the admission was deliberately and openly made, in response to a question

from the court in which counsel were virtually invited to state whether they desired to specify that any part of the paragraph should be regarded as denied. For the court asked:

"16, *the whole of 16,* is admitted?"

and counsel replied:

"Is admitted, yes." (R. 90; emphasis ours.)

It is immaterial that the portion of paragraph XVI, which the amended pre-trial order shows as denied, resembles other allegations of the complaint which defendant also assertedly denied. As stated above, defendant in fact admitted (with the qualification "in the case of a constitutional law") the corresponding allegation of paragraph I-b, though denying a somewhat similar allegation in paragraph XV. The pre-trial *record* thus showed *two* admissions, and *one* denial of allegations relating to defendant's claim to be vested with the power and duty of enforcement. The admissions are entirely consistent with defendant's oral statements, on deposition, that he "had no doubt" that he must enforce the law if constitutional, in the event of violation (R. 132); that the determination of constitutionality was "up to the courts", not to him (R. 140); that it is and will be his official duty to prosecute "if it (the law) is violated", even though doubtful of validity (R. 141).

Incidentally, defendant did not, *in his deposition,* anywhere deny that he claimed that the law imposed upon him the duty of prosecution, but on the contrary,

expressly agreed that the official duty would arise in the event of violation (R. 141); and he did not hesitate to undertake that "duty" almost at once, i. e., within fifteen days (see defendant's brief, pp. 30-31), from the time a violation of the law assertedly took place. Compare plaintiff's motion to remand, and defendant's response thereto, both now part of this Court's record herein.

Where a pre-trial order controls the subsequent proceedings (as here, under Rule 16 of the Federal Rules of Civil Procedure) it should reflect, and not contradict, the unchallenged record of the pre-trial conference. The lower court's pre-trial order, as modified with respect to paragraphs I-b and XVI of the complaint, was clearly erroneous; and since the changes resulted in serious and manifest injury to plaintiff, they should be disregarded, and the original order (R. 92-93) accepted as controlling.

Defendant's brief, pp. 9, 10.

Although the record in the trial court shows that the parties agree upon the abstract question of the constitutionality of the challenged law, it does not follow (as defendant asserts: brief, p. 10), that no finding or conclusion on that point may or should be entered. The question of validity is committed to the determination of the courts, not the parties; and such determination is essential, in order to dispose of the actual controversy between the parties relating to the power and duty of enforcement claimed by defendant: a power and duty admittedly created by the Law if

constitutional, which defendant has never disclaimed, and which, within less than ten weeks from the date of the trial court's judgment, he did attempt to exercise, in spite of his supposed prior admission of invalidity.

Defendant's brief, pp. 10-16.

Defendant states (brief, p. 11) that "he has never claimed the power or duty to enforce the Train Limit Law"; and again contends that by admitting its invalidity and denying any duty to enforce an invalid law, he has denied having any duty or power to enforce this particular law. We have noted that the same contention is made elsewhere in the brief, in much the same language (e. g., at pp. 4, 8, 12, 16 and 25). It was also anticipated in our opening brief: see pages 29 and following thereof.

We repeat that the statement and contention are erroneous, in the light of the pre-trial record (R. 75-76, 90, in particular) and defendant's deposition (R. 132, 140-141), and because based upon the false premise that defendant's own personal determination of the question of validity is final and thus entirely sufficient. We mention the point again only to make certain that it does not pass unchallenged.

The essential facts are that defendant not only admitted that, having taken his oath of office, he had no doubt that he must enforce the Train Limit Law, if constitutional (R. 132); he also went further, and declared that he never had announced, and never would announce, that he would refrain from enforce-

ment (R. 141). Of course he would make no such announcement; and subsequent events have proved that he had determined to prosecute at once in the event of violation.

Defendant argues that the Supreme Court's opinion in *Ex Parte LaPrade,* 289 U. S. 444, 77 L. ed. 1311, holds that the statutory imposition of the duty of enforcement, though coupled with a formal taking of an oath to perform the duty, does not constitute a *threat* (brief, pp. 14-15). Plaintiff does not depend, in this case, upon any allegation or showing of *threat;* none is necessary in a suit for a declaratory judgment.

N. C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249 (at p. 264), 77 L. ed. 730;

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (at p. 241), 81 L. ed. 617;

Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (149).

We do contend, however, in harmony with the *LaPrade* opinion, that when defendant has admitted: (1) that he has taken the official oath, (2) that the oath calls upon him to enforce the law if valid, (3) that he cannot himself finally determine its validity, (4) that he has the official duty to prosecute even though doubtful of validity, and (5) that he has never disclaimed or disavowed the intention to prosecute and says that he never will; and when all this is reenforced by defendant's exceedingly prompt action when a violation was reported: then there can be no doubt that defendant has *in fact,* by statement and conduct, asserted throughout the course of this case the claim of

an existing power and duty of enforcement, which he fully intended from the first to exercise when occasion arose.

It is immaterial whether, as defendant suggests (brief, p. 14), plaintiff contends that defendant was under obligation to disavow the intention to enforce. While the *LaPrade* opinion certainly carries such an intendment, the fact remains that even though defendant might, as he now argues, have refused to state his position when asked, he did not do so; but instead declared (R. 141) that he *never* would avail himself of the opportunity of avoiding official duty which the *LaPrade* opinion appears to afford.

Defendant refers (brief, p. 16) to the "negative order" cases cited in our opening brief (at pp. 62-67); i. e., the *Rochester Telephone case,* 307 U. S. 125, and *Perkins v. Elg,* 307 U. S. 325; but it is particularly noteworthy that he does not deny that his action—or alleged "inaction"—in the present case has been designed to prevent plaintiff from obtaining, in a Federal court, any relief from the admittedly invalid restraints of the Law. The whole course of his conduct demonstrates that such was precisely his purpose.

Defendant also cites (p. 16) certain decisions to support the point that where a defendant files a disclaimer, or admits the contentions of plaintiff, thus tendering no issue, the case must be dismissed without further proceedings, for lack of controversy. The principle relied upon has no application here. Defendant's answer was not a disclaimer; in fact, as to

many of the major allegations it was in effect a denial under Rule 8(b), in that he claimed to have no information or knowledge sufficient to form a belief. Compare paragraphs VIII, X, XII to XXI, inclusive, XXIII and XXIV of his answer (R. 56-65, 68-70). Apart from these averments, however, the answer sufficiently challenged and denied, in particular, plaintiff's allegation that defendant claimed and maintained the right and duty of prosecution under the Law; and for that reason it was necessary to go to trial to determine the issue.

It will be noted that defendant, even though regarded as having stipulated to the correctness of most if not all of the allegations of basic facts respecting the Train Limit Law, as set forth in the complaint, never admitted outright that the Law conferred no power or duty upon his office, and was therefore unenforceable; the most that he said was that the law, *if invalid as claimed by plaintiff,* conferred no such power. Since defendant could not himself effectively determine that the Law was unconstitutional, and its constitutionality is presumed until the opposite has been determined by competent court decision, his answer is in these respects equivalent to a claim that the power and duty of enforcement continue, and the Law is to be enforced until its invalidity be determined. The subsequent trial record (i. e., defendant's deposition) established sufficiently that defendant did claim the right and power of enforcement; and the prosecution commenced by him on April 19, 1940, demonstrates that fact beyond question. It is wholly incor-

rect to say (defendant's brief, p. 16) that defendant has *at all times* admitted that the Law is invalid, and asserted that no duty of enforcement was imposed.

Defendant's brief, pp. 16-20.

In this portion of defendant's brief, he reviews the record again, and contends that since there is no showing of any *act* or *threat* by defendant to enforce the Law, or indeed of any violations which would lead to such action, the question of defendant's power and duty, even if there were opposing claims duly advanced, is and would be purely abstract and hypothetical.

We emphasize again, as in our opening brief, that this argument is essentially the same as the view adopted by the Eighth Circuit Court of Appeals in *Aetna Life Ins. Co. v. Haworth,* 84 F. (2d) 695; and we invite the Court's attention to that opinion (quoted in part in our opening brief, Appx., p. iii), showing that that court cited and relied upon many of the same cases now cited by defendant to support his present contention.

The Supreme Court's reversal of the Circuit Court's decision in the *Aetna Case* has swept away the very foundation of defendant's argument. The Supreme Court held that a showing of *threat* is not necessary, in a declaratory-judgment suit; that where parties having interests in the subject matter present opposing claims, which are so ripened as to permit of a definitive decree which will settle the issue, a sufficient controversy for purposes of a declaratory judg-

ment is presented, even though no irreparable injury is threatened, and no injunction is sought.

Defendant argues, however, that a judgment or decree entered upon this record, even assuming that the parties present opposing claims, would be purely advisory, applying to a *hypothetical* future situation *which might never arise.* The fact is that the situation actually *did* arise; prosecution was not only threatened, but undertaken, within two months and five days from the date of the decree of the trial Court herein.

To save repetition, we ask the Court to refer to pages 44 and following of our opening brief, in which this portion of defendant's argument (having been made before, and therefore fully anticipated) is further analyzed and refuted.

Defendant's brief, pp. 20-29.

This portion of defendant's brief is an attempt to meet the argument at pages 67-85 of our opening brief, and to show that defendant has no interest in the subject matter; or, of he has, that it can be ascribed to him solely by reason of his official status. The argument is thus largely a repetition of that found in subdivision IV (pp. 9-14) of his memorandum in opposition to our motion to remand. It is based upon two essential premises, both of them unsound: (1) that the complaint involves only the abstract question of the law's validity, and that defendant's powers and duties are not in issue; and (2) that Mr. Conway, the individual who occupies the

office of Attorney-General, is wholly distinct from Mr. Conway, the Attorney-General, and that his acts or actions in his official capacity can have no relation to his individual position.

The first premise has already been sufficiently discussed. As to the second, we refer the Court to the argument at pages 69 and following of our opening brief, with the following additional comment:

The contention (defendant's brief, pp. 21-22) is presented that Mr. Conway, as an individual, could not bring the present action, because of lack of individual interest; therefore, it is said, he cannot be made defendant herein. But the question is not whether defendant could bring *this particular* action; but whether he can, as an individual, be a party to a controversy, in *any* action involving the Train Limit Law, or its enforceability. To that question the decision in *Ex Parte Young,* 209 U. S. 123, furnishes the conclusive answer. Defendant, though purporting or claiming to act as Attorney-General, can unquestionably sue plaintiff to enforce the law in the event of violation (as he has actually done); but if the law be invalid, as defendant in this suit has confessed, then he is really acting only as an individual. Defendant can also, without suing, merely threaten to prosecute if a violation is committed; and again, if the law be invalid, he is still only an individual, acting under color of the office, and still subject to suit in that capacity. As the Supreme Court said, in the *Young Case* (209 U. S. 123, at pp. 157-161):

> "The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact * * *
>
> "If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct * * *
>
> "His (the Attorney General's) power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court."

In:

> *Worcester County Trust Co. v. Riley,* 302 U. S. 292,

a case much relied upon by defendant, the Court said (at p. 297):

> "The Eleventh Amendment * * * does not preclude suits against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer."

Defendant asserts that the doctrine of the *Young Case* is inapplicable, because, so he says, the essence of the action there was the act or threatened act of the defendant official; whereas no act or threat by defendant is involved here. Apart from the fact that defendant has now not only threatened, but acted, this

argument simply ignores the language of the *Young Case,* above quoted, establishing that a state officer, sued as an individual, is by his official connection with the enforcement of a statute, and apart from any threat, sufficiently made a proper party to a suit in which that statute and his power to enforce it are challenged; and also disregards the pronouncements, in the *Aetna* and *Wallace Cases,* that in a declaratory suit, where no injunction is sought (precisely the situation here), a showing of impending irreparable injury (i. e., of a threat, which would be subject to injunction) is not required, as a prerequisite to a justiciable controversy.

The opinion in the *Worcester Case* clearly does not sustain defendant's argument. There the plaintiff was seeking to enjoin certain state officials from undertaking to collect a tax; and the Supreme Court held that it was not made to appear that their contemplated action involved any breach of the Federal Constitution. Since they were acting within the scope of official authority, the suit was held to be against the state and therefore barred by the Eleventh Amendment; but as noted above, the propriety of a suit to restrain an individual, acting or claiming to act under color of an invalid state law, was expressly recognized.

The claim is made that an interest in the subject matter can be conferred upon defendant only if the suit be considered as brought against him officially (defendant's brief, p. 28), because he has taken no individual action. This argument is an ingenious at-

tempt to avoid the effect of the ruling in the *Young Case;* but it is doomed to failure for two reasons: first, because it ignores the realities; and second, because it misconstrues the language of the Young opinion. As to the first, defendant simply forgets that he is the occupant of the office of Attorney General; that he has taken the oath; that he has admitted that he is duty bound to prosecute in the event of violation, even though doubtful of the law's validity; that he has stated that he had never announced and never would announce that he would refrain from performing that duty; and, most of all, that he took prompt action to prosecute plaintiff when occasion arose. Defendant has thus exercised the election of which he speaks (brief, pp. 28-29), and demonstrated, if proof be needed, that as the individual occupying the state office he now has and has always had an interest in the subject matter. As to the second, the opinion speaks for itself; but we ask the Court also to review the discussion at pages 70-84 of our opening brief.

Defendant's brief, pp. 29-33.

The argument in opposition to plaintiff's motion to remand, in this portion of the brief, presents substantially nothing not heretofore considered, and requires no extended comment.

Defendant makes a peculiar argument; for on pages 29 to 31, inclusive, under point (a), he asserts that his action of filing suit against plaintiff on April 19, 1940, has no relevancy whatever to the question whether a controversy existed on April 18, 1939, when

the instant suit was commenced, and contends in effect that the state court suit is to be entirely dissociated from the present proceeding; whereas on pages 32 and 33, under point (b), he treats the two proceedings as being virtually one and the same, because he contends that the value of the amount in controversy here must be measured by the amount of the recovery sought in the other case. Of course, these two contentions cannot both be true; and in fact, neither is even approximately correct.

Certainly the state court suit cannot be wholly dissociated from the present suit. The fact that there had been no act committed or threat made by defendant prior to April 19, 1940, is not controlling; for the existence of an actual controversy between plaintiff and defendant does not depend upon a showing of threat made or action taken. It is noteworthy that defendant does not effectively challenge our contention that his action on April 19, 1940, demonstrates his "state of mind", as it has existed throughout the case, and thus corroborates the conclusion which, we assert, is properly to be drawn from his prior admissions and statements: namely, that he has continuously claimed to be vested with the power and duty of enforcement.

On the other hand, the two suits are by no means identical. This action was not, as defendant seems to believe, brought for the purpose of restraining the state prosecution. No *injunction* is sought to prevent the threatened collection of the penalties claimed to be due. Whatever may be the rule as to the amount in controversy in an action where the purpose is to

enjoin the collection or threatened collection of a tax, fee, or license exacted for the privilege of doing business, that rule has no application here. This is a suit involving the constitutional existence of a claimed power to enforce a restrictive statute, and thus essentially the validity of that statute. In such a suit, the right to carry on the business free of the restriction or, otherwise stated, the injury done to the business, because of enforced compliance with the restriction, is the matter in controversy; and the value of the right or injury is the measure of the value or amount in controversy. In the leading case upon which defendant relies: *Healy v. Ratta,* 292 U. S. 263, the Supreme Court (at p. 269) drew the essential distinction between a suit involving an attempt to enjoin collection of a tax or fee, and one in which the challenge is directed to a statutory prohibition enforceable by prosecution.

We call attention further to the fact that, as stated in our opening brief (pp. 95-96), the value of the right sought to be established by the present suit, and thus of the amount in controversy, has been admitted and conceded by defendant to be greatly in excess of the jurisdictional amount (R. 82-84).

Defendant's final point (brief, p. 33) is that the instant case is an equitable action, and that no grounds for equitable relief now exist because a stay order has been entered in the state case. The point is without merit. Defendant again simply confuses the instant case with the state prosecution, assuming that this suit may be regarded as one to enjoin defendant from proceeding in the state court. Such is not its

stated purpose; and it is immaterial that further state prosecutions are not immediately threatened. Moreover, this Court has recently held that a suit for a declaratory judgment is *sui generis,* and not necessarily either legal or equitable in character.

Pacific Indemnity Co. v. McDonald, 107 F. (2d) 446 (448).

Compare, also,

Borchard on Declaratory Judgments, p. 120.

CONCLUSION.

As pointed out in our initial brief (pp. 83-84) whatever position defendant chooses to adopt, he cannot avoid the fact that an actual controversy exists and has existed herein from the beginning. The prosecution commenced by him on April 19, 1940, in the name of the state, is merely conclusive evidence; and as such it is now before this Court, as part of this record, by virtue of plaintiff's showing on motion to remand and the admissions of that showing contained in defendant's response. It follows that defendant, if claiming to have acted officially, is really claiming that the law is valid (for only a valid law could confer official status); and in that event his claim squarely controverts plaintiff's claim that the law is void, and confers no power at all. If, on the other hand, defendant continues to admit, for the purposes of *this* case, that the law is void, then his action is purely individual, and he stands as such individual asserting a power which, according to plaintiff's claim, has no legal existence.

Defendant represents himself (brief, p. 34) as an individual whom plaintiff is seeking to have "adjudged guilty of committing an individual wrong". Nothing could be further from the facts. Plaintiff has not sought any injunction, or damages, or even costs against defendant; and although defendant has sued plaintiff in the state court, to enforce a law which he has here said he believes invalid, plaintiff still seeks no coercive relief or damages, but only a declaratory judgment as to whether the law may be enforced in the manner attempted.

The record, particularly as supplemented by our motion and defendant's response, demonstrates that the parties maintain definitely adverse claims respecting a subject matter in which each has a legal interest. All other essential facts having been determined, the judgment should be reversed, and the cause remanded for the entry of judgment as prayed in the complaint; or, if the Court deems that the trial record should be supplemented as proposed by our motion to remand, that motion should be granted.

Dated, San Francisco, California,
August 28, 1940.

Respectfully submitted,
ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
Attorneys for Appellant.